United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7382

United States Court of Appeals
FOR THE SECOND CIRCUIT

YAWATA IRON & STEEL CO., LTD.,

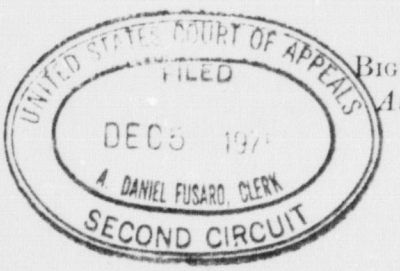
Plaintiff-Appellant,

against

ANTHONY SHIPPING CO., LTD.,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT YAWATA IRON & STEEL CO., LTD.



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Reply to the Carrier's Contention that the Vessel Was Seaworthy

At page 12 of its answering brief the carrier (appellee) states:

> "Appellant's *basic error* on this appeal is a belief that fault must be inferred if an excepted cause is not proven. The first eighteen pages of its brief (and many pages thereafter) labor the argument that since the number one hatch failed in expectable weather, it is conclusively proven that the vessel was unseaworthy. Not so. It merely raised a *rebuttable presumption* that the vessel was unseaworthy. *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, 318 F. 2d 720, 725 (2nd Cir. 1963). But the trial court found that the evidence offered by the vessel owner rebutted that presumption." (emphasis added)

Basic error indeed. This misconception of the law advanced by the carrier was erroneously adopted by the lower Court. It is utterly wrong. It was this approach which misled the Court below.

There was nothing mysterious about "how" sea water entered the hull. It entered the hull through No. 1 hatch. The No. 1 hatch cover failed in expectable weather. It failed when it shouldn't have failed. Seaworthiness with respect to No. 1 hatch cover means not failing when it shouldn't fail. Failure of a hatch cover does not raise a presumption that the hatch cover failed. It *did* fail. Consequently, it was unseaworthy by definition because it failed in expectable weather.

It is true that there are cases that hold that there is a presumption of unseaworthiness when a vessel sinks for

an unknown reason in expectable weather. (See our main brief, pp. 9-12.) But that is only part of the case with respect to the "Antonios Demades." There is no mystery as to "how" the sea water entered the hull of the "Antonios Demades." Sea water entered the hull through No. 1 hatch cover. The No. 1 hatch cover failed in expectable weather.

Cargo, in its main brief, used substantial space to correct the erroneous conclusion that the vessel was seaworthy. We cited various cases that define seaworthiness, e.g., "To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong, *as to be competent to resist all ordinary action of the sea* . . ." (emphasis added). *Dupont* v. *Vance,* 19 How. (60 U.S.) 162, 167 (1856). "'Seaworthiness' means such fitness . . . as will enable a ship to encounter the winds and battering waves of the seas . . ." *Norris Grain Co.* v. *Great Lakes Transit Corp.,* 70 F.2d 32, 35 (7 Cir. 1934), cert. denied 293 U.S. 565 (1939). See also, *International Produce, Inc.* v. *S.S. Frances Salman, et al.,* 1975 A.M.C. 1521, 1538-1539 (S.D.N.Y. May 23, 1975).

There is no authority to the contrary.

On the "Antonios Demades" there was a specific physical failure of a specific part of the vessel, i.e., the No. 1 hatch cover. This is known. It is undisputed. There is no need for a presumption as to No. 1 hatch cover. The merits of this case do not rest on a presumption alone. Unquestionably, No. 1 hatch was *not* seaworthy. Accordingly, there was no *rebuttable presumption* raised with respect to No. 1 hatch cover, as contended by the carrier.

"Why" the No. 1 hatch cover failed was not explained. The lower Court held that "the failure of the No. 1 hold hatch cover was unexplained" (Opinion, 28a). The burden of explanation is on the carrier, as it should be. The carrier is the one in the best position to explain it. This

is significant because if the cause was not a latent defect, then the carrier's further burden of proving due diligence is most difficult. If the defect wasn't a latent defect, there is no reason why diligent inspections wouldn't have revealed the defect, and no reason why diligent maintenance and repairs wouldn't have corrected the defect which caused the hatch cover to fail when it shouldn't have.

On page 13 of its answering brief the carrier states:

> "Proof of due diligence rebuts any presumption of unseaworthiness . . ."

Again, this is utterly wrong. It is mixing apples and oranges. The concept of due diligence doesn't come into play unless a vessel is unseaworthy. Whether or not due diligence was exercised does not alter the unseaworthiness of a vessel or rebut any presumption. They are simply two different things. The "unexplained" failure of No. 1 hatch cover is nonetheless a *failure* of No. 1 hatch cover. The test of whether or not due diligence was exercised does not retroactively correct the unseaworthiness of the vessel.* Either No. 1 hatch cover failed in expectable weather or it didn't. Everyone knows it did, and the lower Court so held. The vessel was unseaworthy.

Reply to the Carrier's Contention that it Exercised Due Diligence to Make the Vessel Seaworthy

Since the No. 1 hatch cover was unseaworthy and was a cause of the loss, the crux of this case is the *issue of due diligence*. Only if the carrier can *prove* that it exercised due diligence to make the vessel seaworthy prior to the inception of the voyage (even though it is now established that the vessel was, in fact, *not* seaworthy), can

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* While due diligence does not erase unseaworthiness, an unseaworthy condition, unless it be a latent defect, may well disprove an allegation of due diligence.

the carrier avoid liability. But there are two very significant hurdles for the carrier. *First,* it has the burden of proving due diligence. *Second,* this burden of proof must be sustained with respect to a specific known physical failure, which the carrier has not been able to explain (Opinion, 28a, 39a, 45a).

The exercise of due diligence to make the vessel seaworthy means doing things which would prevent No. 1 hatch cover from failing, e.g., proper maintenance, proper repairs, proper operation and proper inspections. But, what caused it to fail? The cause is not known. The carrier has not passed this hurdle. Usually a carrier argues that no amount of due diligence would reveal a *latent* defect. The carrier in this case has not—indeed it cannot—make such an argument, because there is no proof that a latent defect caused the hatch to fail. The carrier has not established that the defect or cause was a latent one. If it wasn't a latent defect it could have been detected by a diligent inspection, and prevented by diligent repairs or maintenance. Accordingly, the carrier has not sustained its burden.

On pages 1 to 8 of its brief the carrier attempts but fails to demonstrate that it exercised due diligence to make the vessel seaworthy. The carrier states that it "relied primarily" on the testimony of Omachi, the surveyor in Japan who examined the vessel *one year before this casualty* (Carrier's brief p. 2). But what about the 12 months between his inspection and the casualty? For this, the carrier relies on Exhibits "F, G, K, B, D" (Carrier's brief p. 4) and testimony by the ship's bosun.

Exhibits F and G are loading certificates, dated December 29, 1969 and January 6, 1970, respectively. Exhibit F states in bold letters:

> "THIS IS NOT A CERTIFICATE OF SEAWORTHINESS" (510a)

Exhibit G states in bold letters:

> "THIS CERTIFICATE IS NOT A CERTIFICATE OF SEAWORTHINESS AND RELATES ONLY TO THE FOLLOWING CARGO" (511a)

Exhibits K, B and D relate to routine *visual,* on-hire charter type inspections conducted by Nielsen, Morris and Allison. As we demonstrated on pages 40 to 44 in our main brief, these visual inspections, where no tests were performed, are under the facts of this case and under the law insufficient to satisfy the carrier's burden of proving due diligence.

The carrier's reliance on the testimony of the bosun falls pitifully short of proving due diligence. The bosun testified in response to questions posed by carrier's attorney:

> "Q. Was the MacGregor cover on No. 1 just as strong as the covers on all the other hatches?
>
> A. In my opinion, yes. *However, I'm not an engineer.*
>
> Q. How many sections did the No. 1 hatch cover have?
>
> A. *I don't recall exactly. Four or five."* (Ex. 40, p. 12, 439a) (emphasis added)

The bosun who admittedly was "not an engineer"* and who couldn't even recall how many sections No. 1 hatch cover had, can scarcely be relied upon by the carrier to establish due diligence with respect to repairs, maintenance, inspections and periodical testing of the hatches. Moreover, the bosun's testimony is inconsistent with the Master's notice of stevedore damage issued before the voyage, in which he states, among other items of damage, that "The MacGregors on the No. 4 Hold bent in two places." and that "The Hand rails of No. 1 Mast House are broken in two sections" (Ex. L). Presumably, other damage occurred in the preceding year during which time thousands

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* The vessel's Chief Engineer, who survived, was not produced by the carrier.

of tons of bulk cargoes were loaded in and out through No. 1 hatch. Yet, there is no evidence of any repairs, adjustments or maintenance to any hatch coamings and covers during that time.

Thus, the carrier refers to Omachi's year-old inspection, to some perfunctory loading certificates and charter-type surveys and to the bosun's testimony—and blithely states: "Due diligence demands nothing more" (Carrier's brief, p. 4). We respectfully submit that this Court should demand much more in setting an adequate standard for "due diligence" when men's lives and property are at stake. Aside from the loss of cargo, ten men perished in this tragedy.

The carrier did not produce its marine superintendent. The carrier's reason for not producing its marine superintendent is:

> "Had we done so, one can confidently predict an attempted impeachment for bias." (Carrier's brief p. 3)

This is an incredible statement. The issue is due diligence. The carrier has the burden of proving due diligence. The marine superintendent is the crucial witness. "The officer in charge of this area (i.e., the hatches), the chief officer, did not survive" (Carrier's brief p. 4). The marine superintendent, the person whose responsibility is the "care, maintenance and upkeep" of the vessel (de Kerchove's, *International Maritime Dictionary,* 2nd Printing 1948, p. 449) was not called by the carrier to testify for the reason that cargo would have questioned him.

It is inescapable that the carrier failed to produce the key witness in its organization to testify as to what was done by the carrier in the way of upkeep, maintenance, repair and inspection of its vessel. The carrier, who has the burden of proving due diligence, merely offers the excuse that if he had been produced "one can confidently predict an attempted impeachment for bias" (Carrier's brief p. 3). Nonsense.

In *The Hamildoc*, 1950 A.M.C. 1973 (Dom. of Canada, King's Bench, Appeal Side 1950), cited on pages 31 and 36 of our main brief and on page 7 of carrier's brief, the carrier had the following *managing* personnel testify: its manager in charge of vessels in southern waters, its marine superintendent at Georgetown (where repairs had been effected), and its superintendent engineer at Georgetown. Despite the carrier's alleged peril of the sea defense, the Court held that there was no peril of the sea, that the "Hamildoc" was unseaworthy and that the carrier failed to prove that it had exercised due diligence to make its vessel seaworthy.

In the instant case, we don't know whether the carrier's marine superintendent even attended during the repairs of the "Antonios Demades" in Japan; we don't know what, *if anything*, he did to follow up on these repairs; we don't know what, *if anything*, he did or ordered during the entire year following the repairs to maintain, test, inspect and keep the vessel in good shape. But *we do know* that the hatch failed when it shouldn't have and the nameless marine superintendent was inexcusably never produced by the carrier. How can the carrier be found to have sustained its "burden of proving the exercise of due diligence" (COGSA § 1304(1))? Clearly it has not. See *Compagnie Maritime Francaise* v. *Meyer*, 248 Fed. 881, 885 (9th Cir. 1918); *The Otho*, 49 F. Supp. 945, 950-951 (S.D.N.Y. 1943), aff'd 139 F. 2d 748 (2 Cir. 1944); *The Assunzione*, 1956 (2) Ll. L. Rep. 468, 485-486; *States Steamship Company* v. *United States*, 259 F. 2d 458, 465-470, 472-475 (9th Cir. 1957-1958), cert. denied 358 U.S. 933, rehearing denied 359 U.S. 921 (1959); and other cases cited in our main brief.

The carrier failed to produce the marine superintendent; it failed to produce any of its managing personnel whatsoever; and, it failed to produce any records of the carrier's own regular maintenance, inspection or testing of the vessel during an entire year preceding this casualty. The

result must be a finding that the carrier failed to sustain *its statutory burden* of proving due diligence.

In its brief the carrier relies on various cases to support its contention that due diligence was exercised. These cases are distinguishable in that they involve either a *peril of the sea* or a *latent defect.* Neither a latent defect nor a peril of the sea has been established with respect to the "Antonios Demades."

1) *Margarine Verkaufsunion* v. *G. C. Brovig* (S.D.N.Y., 1970), 318 F.Supp. 977, 982 (p. 4 Carrier's Brief). Here there was "a brittle fracture which resulted from a defect in the metal, discoverable only through a destructive test of the plate." The Court said "in sum there was a latent defect in the plate."

2) In *J. Gerber & Co.* v. *S.S. Sabine Howaldt,* 437 F.2d 580 (2nd Cir. 1971) (p. 6 Carrier's Brief), the Court held that the wind and sea encountered by the vessel were "perils of the sea" and that "(T)he damage to the cargo was caused by the violence of the wind and sea and particularly by the resulting cross-seas . . ." (pp. 588, 597).

   The lower Court in the instant case held that the weather encountered by the "Antonios Demades" was not such as to constitute a peril of the sea, and "the 'Antonios Demades' did not encounter cross seas" (Opinion, 19a-20a).

3) *Balfour, Guthrie & Co., Limited* v. *American-West African Line, Inc.,* 136 F.2d 320 (2nd Cir. 1948) (p. 6 Carrier's Brief). Here the lower Court held that "The wind and storm from which the 'Zarembo' suffered was a peril of the sea" (44 F.Supp. 915, 920). This Court affirmed that the weather encountered was a peril of the sea, and that due diligence disclosed no flaws in the plate. This Court said:

   > "The regular annual survey of the 'Zarembo' was made in January, 1939, and her four-year

special survey in November, 1939, just before the African voyage. During both, the plating was hammer tested, inside and out, by at least one surveyor. And numerous visual examinations of the hull were also made. All told, some fifteen men inspected the plate and riveting between the first survey and the time of the accident, in some cases on more than one occasion." (p. 321)

Those inspecting the plate on the "Zarembo" included the Marine Superintendent and Port Engineer (44 F.Supp. 915, 919).

4) In *Peter Paul Inc.* v. *Rederi A/B Pulp* (C.A. 2, 1958), 258 F.2d 901, 905 (p. 6 Carrier's Brief), the vessel broke in two as a result of "a brittle fracture." The experts, who actually examined the vessel after the casualty, "were emphatic in concluding that the notch was a latent defect . . ." The only disagreement was on the nature of the notch. One expert believed it was a slag inclusion in the steel. The other expert believed it was a micro-crack in the weld. But they were certain that the defect was *latent.*

None of the experts who testified at trial had ever inspected the "Antonios Demades." The Marine Superintendent, who is responsible for the care, maintenance and upkeep of the vessel, did not testify. No one ever said that the failure of the No. 1 hatch cover on the "Antonios Demades" was caused by a *latent* defect.

5) *The Hamildoc* (Kings Bench Appeal, Canada), 1950 A.M.C. 1973, 1985 (p. 7 Carrier's Brief), is a Canadian case where the vessel sank with a cargo of ore. The Court said that "Due diligence means doing everything reasonable, not everything possible." It also said that "No amount of time spent in the repairers' hands is itself going to establish due diligence." The Court concluded that due diligence was *not* exercised.

Very extensive repairs were made to the "Antonios Demades" in Japan over a year before the casualty. Was the Marine Superintendent present? Did he ever inspect the vessel during the year prior to the sinking? The carrier does not say "Everything reasonable" has not been done.

Summary

The carrier-bailee has taken the cargo and lost it without a valid explanation. The No. 1 hatch cover failed in expectable weather when it shouldn't have and the vessel flooded and sank. The carrier failed to produce any records of maintenance, repairs or tests of the hatch covers for the entire year preceding the loss.

The weather encountered by the "Antonios Demades" was *not* a peril of the sea. The carrier has not explained *how* the No. 1 hatch cover failed. Something was *wrong* with it. A *latent* defect has not been proven. The sparse evidence produced by the carrier indicates that it is not interested in going into any detail concerning the care and maintenance of the hatch covers on the vessel for the year prior to the casualty. The carrier has not even produced its Marine Superintendent. There is no justification for requiring cargo to swallow the loss under these circumstances. The carrier should be held liable.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 5th day of DECEMBER 1975

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Attorneys for APPELLEE